No. 86-256

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE,

Petitioner,

v.

A CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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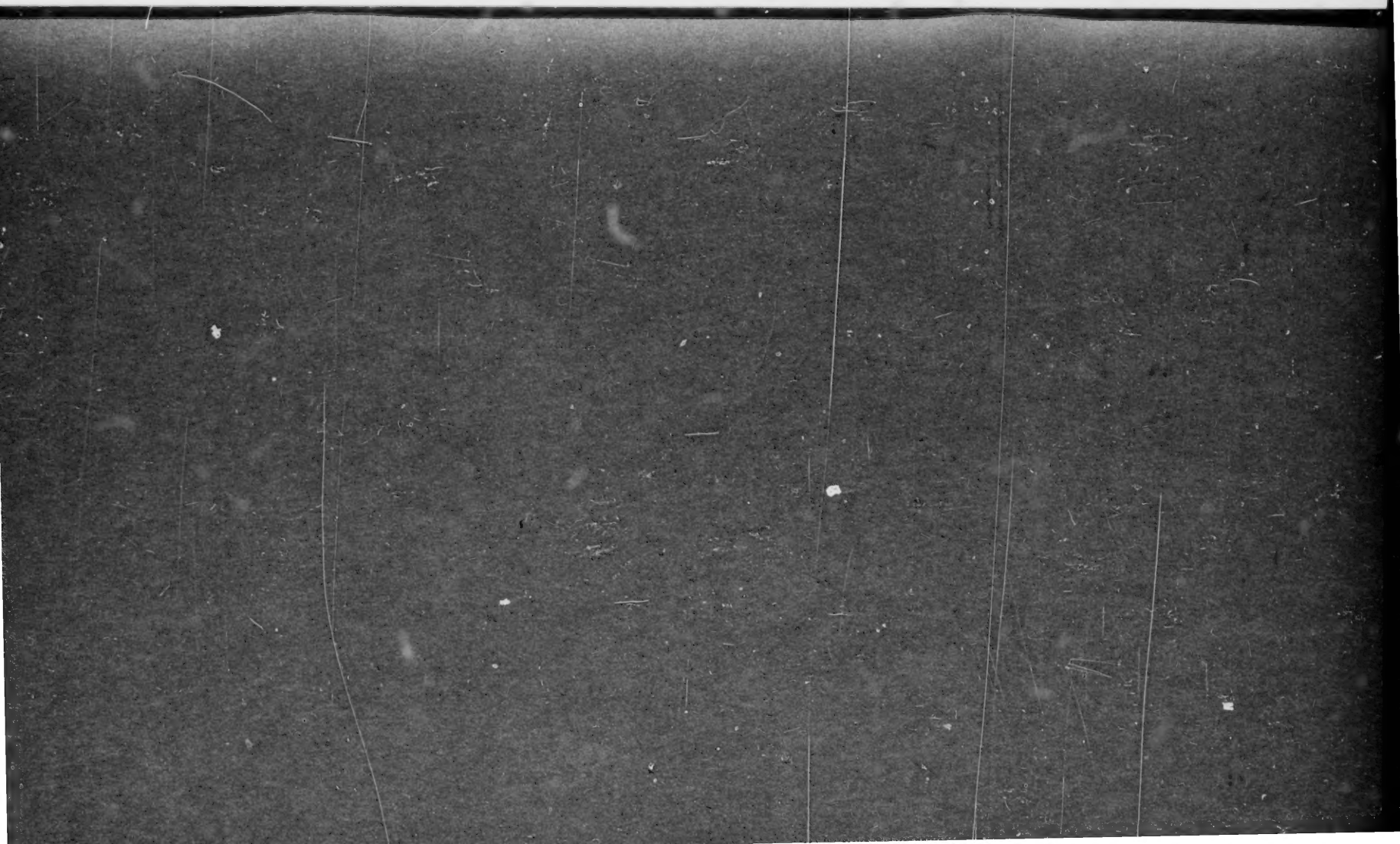

Question Presented

Petitioner's nine questions reduced in the end to one: were the two cases that are the subject of the petition wrongly decided by the district court and the court of appeals. This is resolved by reference in both cases to the particular facts of petitioner's situation and to the complete absence of any legal basis for the claims asserted. Neither inquiry is worthy of the exercise of this Court's discretionary jurisdiction.

Petitioner brought suit against his former clients on the subject matters of his previous advice to them, and sought from the outset to assert claims on behalf of others, even after the district court and the court of appeals held that he could not do so. His claim in one case was dismissed by entry of summary judgment because (a) he was judicially estopped from pursuing his claim having sworn, in an affidavit submitted to the court that supervised his divorce proceedings, that the property he claimed in this action was his did not belong to him at a time when, under his claims in this action, it did; (b) his unclean hands barred his claims because his claims were inconsistent with legal advice he had previously given respondents and he had persistently flouted orders of the district court and the court of appeals; and (c) his claim had no legal basis. His claim in the other case was dismissed on grounds of mootness and unclean hands, and because the regulations on which he relied are inapplicable.

Statement Pursuant to Rule 28.1

The record in both cases has been sealed, on respondents' motion, to preserve the anonymity of the parties and protect the confidences that respondents imparted to petitioner, who was formerly their lawyer and who sued them on the subject matters on which he advised them. The information called for by Rule 28.1 has therefore respectfully been submitted separately, with a request that it be accepted under seal.

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I.

Constitutional Provisions, Statutes and Rules Involved

Many of the provisions that petitioner cites are irrelevant to these actions. The elapsed time regulations promulgated by the Department of the Treasury under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), which appear at 26 C.F.R. § 1.410(a)-7(a)(1)(ii) and § 1.410 (a)-7(d)(1)(i)-(ii) (1982), are relevant, but are not cited by petitioner. They are appended following this brief.

II.

Statement of the Case

Petitioner seeks review of the affirmance by the Court of Appeals for the Fifth Circuit of the entry of summary judgment by the United States District Court for the Southern District of Texas (Honorable James DeAnda, D.J.), pursuant to Fed. R. Civ. P. 56, dismissing two actions brought by petitioner against his former clients, A Corporation and A Pension and Welfare Benefit Plan ("Benefit Plan").[1]

A. Petitioner's Legal Advice to Respondents

Petitioner was employed by respondents as an attorney from May 27, 1975 to March 31, 1980, when he elected to leave and accept employment with another company. During much of this four year and ten month period, he provided legal advice to respondents' personnel on subject matters directly and substantially related to those on which he based his claims in these lawsuits. Petitioner consulted with and rendered advice to respondents' personnel on matters arising under the statutes on which he purported to base his suits, and had full access to respondents' files on such matters. As petitioner said in an affidavit filed in both actions in May 1981, his duties as legal counsel to the Plan required him to study and become familiar with all the Plan documents.

While he was employed by respondents, petitioner rendered legal opinions annually, for the benefit of the Plan's

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[1] The pseudonyms were placed in the style of the cases at respondents' request, as a part of the sealing of the record. Respondents will refer to the parties by those pseudonyms as well as their positions on this petition. In one of the cases, petitioner also sued the party designated in the caption as An Insurance Company, but none of the questions petitioner presents to this Court concerns his claim against that party.

auditors, on whether the Plan and the administration of the Plan complied with ERISA. In all such opinions, petitioner stated that the Plan and administration of the Plan complied with ERISA and other applicable laws. The Plan "administration" covered by these opinions included the vesting provisions of the savings feature of the Benefit Plan.

B. Petitioner's Pre-Litigation Threats

After leaving respondents employ, but before filing suit, petitioner demanded payment to him of benefits he said were owed to him. When payment was refused, petitioner threatened suit, on behalf of himself and a purported class, if respondents did not pay him what he said he was owed, make "restitution" to the purported class, and pay petitioner a "contingent attorney fee" equal to ten percent of a "fund" that petitioner claimed was worth "millions." Respondents did not pay, but instead reminded petitioner that he should consider the ethical obligations he owed to his former clients. He told them they should not be "naive," and reiterated his threat to bring suit. When no payment was forthcoming, petitioner filed both actions. *See Doe* v. *A Corporation*, 709 F.2d 1043, 1049-1050 (5th Cir. 1983); *see also Doe* v. *A Corporation*, No. H-81-396 (S.D. Tex. June 27, 1985) (*"Doe II"*), Petition at 5a-6a.

C. Petitioner's Complaints

Petitioner filed complaints in both actions in February 1981. One complaint (the "Savings Plan" Action) (*Doe I*) alleged claims with respect to the use and disclosure of the credited service rules in the Benefit Plan that determine when an employee's right to the employer contributions to his or her Savings Plan vests. The Savings Plan is a savings feature of the Benefit Plan that permits an employee to ask for withholding and investment of a percentage of salary; the employer matches that contribution, up to stated percentages. The Benefit Plan requires five calendar years of

service before the employee's right to the employer matching contribution vests. Petitioner worked at A Corporation for four years and ten months. He claimed, however, that under ERISA and regulations thereunder, the Benefit Plan was required to give him credit for a full fifth year of service, because (he said) he worked more than 1,000 hours in his fifth year. This claim was based, alternatively, on the arguments that (i) the statute requires one year of credit for 1,000 hours, and the "elapsed time" regulations promulgated under ERISA by the Department of the Treasury, which permit benefit plans to count vesting service by calendar years rather than 1,000 hour "years", are invalid, or (ii) the Benefit Plan was not drafted in terms that permit it to rely on the elapsed time regulations and has not historically used the elapsed time method of calculating vesting service. *See Doe* v. *A Corporation,* No. H-81-397 (S.D. Tex. December 10, 1984) (*"Doe I"*) Petition at 12a, 18a-21a.

The other complaint (the "Insurance Plan" Action) (*Doe II*) alleged claims concerning the contributory group life insurance feature of the Benefit Plan. Petitioner alleged that certain dividends and retroactive rate refunds paid to A Corporation by the insurance carrier that provides coverage for, among other things, the contributory group life insurance feature of the Benefit Plan, should not have been retained by A Corporation as public reports filed by the Benefit Plan showed they were, but should instead have been paid to himself (and other plan participants). Petitioner claimed a right to recover the portion of the premium payments that he said was attributable to the dividends. *See Doe II,* Petition 4a, 6a-7a.[2]

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[2] Petitioner also asserted claims based on respondents' disclosures of the life insurance conversion options available to a departing

(footnote continued on following page)

Petitioner sued in both actions on behalf of himself and a purported class. He signed the complaints as co-counsel, and sought not only broad equitable relief and damages for the individual members of the alleged class, but also special awards to himself personally "in excess of $300,000" in the Savings Plan Action and one-third of any recovery awarded the purported class in the Insurance Plan Action, treble damages (claimed to be provided by statute) in the Savings Plan Action, and a "reasonable attorney's fee" in both actions, to be calculated in the Insurance Plan Action as a percentage of the "class" recovery. *See Doe,* 709 F.2d at 1045.

A Corporation and the Benefit Plan denied all substantive allegations, alleged several affirmative defenses, and counterclaimed for injunctive relief based on petitioner's disability to pursue either action in any capacity because of his former attorney-client relationships with them.

D. The March 1982 Dismissals

On March 30, 1982, the district court granted motions by respondents for summary judgment and dismissed petitioner's complaints with prejudice as to petitioner but without prejudice to any present or former employee of A Corporation, granted respondents the injunctive relief they sought, and sealed the record. The March 1982 judgments followed a year of litigation in which (1) there was extensive document and other discovery and an evidentiary hearing, (2) petitioner moved (in the Savings Plan Action) for summary judgment on his own behalf (though not that

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(footnote continued from preceding page)

employee. The district court dismissed those claims because petitioner knew, from his years of providing legal advice to respondents about the Plan, that the Plan did not offer the conversion option he claimed in the Insurance Plan Action. *Doe II,* Petition at 4a-5a. Petitioner has not raised the issue in this Court.

of his purported class), and (3) all parties submitted affidavit and documentary evidence on respondents' motions for summary judgment and fully briefed all relevant issues.

The March 30, 1982 dismissals were based on the irrebuttable presumption—created by the substantial relationship between the subject matter of the actions and of petitioner's previous legal advice to A Corporation and the Benefit Plan—that petitioner would, in prosecuting the actions, use his former client's confidences to his own advantage and their disadvantage, in violation of ethical Canons. *See Doe,* 709 F.2d at 1045.

E. The Court of Appeals Affirmance and Remand

On July 22, 1983 the court of appeals affirmed the dismissal of the complaints with respect to the class claims, but held that petitioner was not precluded from pursuing his individual claims solely by virtue of his status as respondents' former counsel, and remanded the case for further proceedings. *Doe,* 709 F.2d at 1048, 1050-51.

F. Proceedings on Remand

Respondents moved on remand for a permanent injunction against disclosures of respondents' confidences by petitioner and his counsel, to ensure that there would be no doubt about the existence of the obligation to maintain confidentiality. Petitioner opposed entry of such an order, arguing that prosecution of his individual claims made it necessary for him to speak about the Benefit Plan with the Department of Labor and others, and that an injunction would somehow impede discovery. The district court granted respondents' motion.

In addition, the district court, emphasizing that under the court of appeals decision petitioner could not sue on behalf of anyone other than himself, entered an order

directing petitioner to amend his pleadings to delete references to others, so that the nature and amount of his individual claims would be clear. Petitioner delayed in amending his complaints, and once he did so, he included all the items that had rendered the original complaints objectionable: references to persons other than petitioner and assertions that petitioner sued on behalf of others as well as himself, claims for benefits under the A Corporation annuity plan (when petitioner admitted that he himself had no such claim), a request for an accounting (when petitioner's damages would be readily ascertainable), and express prayers for relief on behalf of persons other than petitioner. Respondents' motions to strike these pleadings, as inconsistent with the mandate of the court of appeals, were granted. Further amended complaints were filed and answered in November and December 1984. *See Doe I,* Petition at 16a, and *Doe II,* Petition at 8a.

The parties conducted additional discovery in the Savings Plan Action in July and August 1984. At his deposition on July 27, petitioner testified, among other things, that (1) in an affidavit he filed with a Texas court in 1979, at a time when, according to his claim in the Savings Plan Action, the employer contributions to his savings account were vested, he swore that those contributions were *not* vested (and were therefore not available to be divided with his wife as community property), and (2) he knew that the Plan was administered in accordance with the elapsed time regulations when he advised respondents that the Plan was administered in accordance with ERISA. *See Doe I,* Petition at 13a-15a.

G. The Dismissal of Petitioner's Individual Claims

On August 20, 1984 petitioner renewed his motion for summary judgment in the Savings Plan Action. Respond-

ents filed a cross-motion for summary judgment on October 9, 1984.

By memorandum and order dated December 10, 1984 the district court granted respondents' cross-motion for summary judgment, denied petitioner's motion, and entered judgment for the respondents.

First, the district court held that the doctrine of judicial estoppel foreclosed petitioner from claiming that the employer contributions to his Savings Plan account were vested, because that claim was flatly inconsistent with his prior sworn statements to the Texas court that adjudicated his 1979 divorce proceeding. *Doe I*, Petition at 12a-14a.

Second, the district court concluded that petitioner's claims were barred by the doctrine of unclean hands. "The totality of [petitioner's] behavior in this case illustrates a saga of deceit, dishonesty, and vexatiousness in the discovery process, and a total disregard for the attorney-client relationship." *Doe I*, Petition at 14a-18a.

Third, the district court held that in any event the substantive law of ERISA and the terms of the Benefit Plan were contrary to petitioner's claims that the employer Savings Plan contributions were vested. The Benefit Plan provided, as ERISA permitted and as petitioner, a lawyer familiar with the terms of the Plan, knew, that petitioner had to work at A Corporation for five calendar years before his right to those contributions vested, and it was undisputed that he worked there fewer than five calendar years. *Doe I*, Petition at 18a-21a.

On January 31, 1985, respondents moved the district court for summary judgment in the Insurance Plan Action. They did so on three grounds: petitioner's claims were without merit; petitioner's unclean hands barred his claims;

and mootness. The mootness argument stemmed from A Corporation's and the Benefit Plan's offer to allow judgment to be taken against them in the full amount ($1,247.63) of the premiums petitioner paid for contributory life insurance coverage while he was employed by A Corporation as a lawyer. The offer was made solely for the purpose of avoiding the expense and effort associated with taking the action to trial. *See Doe II*, Petition at 7a.

Petitioner said, in a response filed with the district court, that he would accept the amount offered subject to (i) his application to the Court for attorneys' fees and costs; (ii) dismissal with prejudice of the respondents' "cross-action;" (iii) "cessation of all adverse employment recommendations" by respondents' employees and agents; (iv) an agreement by respondents not to file "any professional grievance" against petitioner; and (v) an agreement by the "fiduciaries of the Benefit Plan" to make "restitution without public sanctions" under the regulations petitioner had cited in support of his "dividend" claims.

By Memorandum and Order dated June 27, 1985 the district court granted respondents' motion for summary judgment.

First, the district court held that petitioner could not claim injunctive or declaratory relief because he was no longer a participant in the Plan and had no personal cognizable legal interest in the present or future administration of the Plan. *Doe II*, Petition at 8a-9a.

Second the district court concluded that petitioner's individual damages—which were, as the court of appeals had previously affirmed, all he could claim a right to recover —consisted of no more than his claim to his share of the alleged dividend. Petitioner was not entitled to an accounting because his share of any refund that might be owed

to him was readily ascertainable and "the only other apparent purpose for such an accounting would be to improperly obtain information concerning the purported claims of other Plan participants." *Id.*

Third, the district court held that the offer of judgment by respondents A Corporation and Benefit Plan in the full amount of his total premium payments mooted petitioner's claim for compensatory damages equal to the portion of those payments characterizable as "dividends." *Id.*

Fourth, as an "alternative basis" the district court held that respondents were entitled to judgment on the grounds of petitioner's "bad faith and unclean hands." *Doe II*, Petition at 9a. The district court noted that petitioner's misconduct was evidenced by the totality of the record in both actions and explicitly found that petitioner had "'attempted either to mulct or blackmail A Corporation.'" *Id.* (quoting *Doe*, 709 F.2d at 1050).

H. The Court of Appeals Affirmance

The cases were consolidated for purposes of appeal. Both were affirmed by the Court of Appeals for the Fifth Circuit, without opinion, citing Rule 47.6 of the Rules of that court. 788 F.2d 759 (5th Cir. 1986). The mandate issued June 2, 1986.

III.

Reasons for Denying the Petition

A. The Savings Plan Action *(Doe I)* Does Not Raise Any Substantial Question of Public Importance.

The district court dismissed this action on three grounds: judicial estoppel; unclean hands; and the legal insufficiency of petitioner's claims. Petitioner claims there was error in

the decision, affirmed by the court of appeals, in that (i) the application of the doctrines of judicial estoppel and unclean hands in an ERISA case was allegedly inconsistent with holdings of other courts of appeals (Petition Pt. 3 at 30-32); and (ii) petitioner's claim that he was entitled to the employer contributions to his savings account was a sound legal claim (Petition Pts. 1 and 2 at 25-29 and 29-30).

1. *Judicial Estoppel and Unclean Hands*

Petitioner does not challenge the district court's holding that there were grounds to invoke these doctrines, and there is no basis for any such challenge. Petitioner's claims were inconsistent with his prior sworn statements to another court, and before and during the lawsuit, he demonstrated contempt for the ethical obligations he owed to his former clients and to his duty, as an officer of the court, to abide by its rulings.

Petitioner argues instead that the supersedure clause in ERISA, 29 U.S.C. § 1144(a), must be read to prohibit a district court from applying such doctrines to ERISA claims. Petitioner claims that other courts of appeals have held that under ERISA's preemption clause such doctrines cannot be applied to ERISA claims.

Petitioner's argument is absurd, and the supposed conflict among the circuits does not exist. What the district court did was to apply judicial rules of general application to petitioner's conduct, and bar his claims when, measured by those rules, his conduct was found wanting. One of the rules is that a litigant cannot make claims that contradict earlier sworn statements the litigant has made to another court. This serves the salutary purpose of inhibiting the urging of falsehoods on courts. *See Doe I*, Petition at 12a-14a. The other rule is that there are limits to the

extent to which a court will allow claims by a lawyer against his former clients when the claims contradict advice the lawyer gave the clients, and when the lawyer has attempted to blackmail the clients before suit was filed and has persisted in the litigation in efforts to inflate his own claims in an effort to put pressure on the defendants to settle. *See Doe I*, Petition at 14a-18a.

No court has held anything that is inconsistent with the district court's holdings. ERISA plaintiffs, like all other plaintiffs, are subject to rules of general application governing the conduct of judicial proceedings. ERISA preempts state laws that contain substantive provisions on pension and welfare benefit matters. But ERISA does not immunize ERISA plaintiffs from rules that constrain their behavior as litigants, any more than it immunizes them from any other form of disability to sue, such as releases they give, which are in the form of contracts made under state law.

2. *The Legal Insufficiency of Petitioner's Claims*

Even if the significance of petitioner's elapsed time arguments were not diminished in this case by the existence of other grounds for dismissal, the arguments would be an insufficient basis for granting a writ of certiorari. Petitioner claimed that the elapsed time regulations were invalid, that the Benefit Plan was drafted in such a way that it could not take advantage of them, and that the Plan did not in fact use the elapsed time method.

a. *The Elapsed Time Regulations*

Although the petition fails to acknowledge it, this Court has previously denied a petition for a writ of certiorari in a case that raised squarely the issue of the validity of the elapsed time regulations. *Swaida* v. *IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd per curiam*, 728

F.2d 159 (2d Cir.), *cert. denied*, 469 U.S. 874 (1984), held that the elapsed time regulations were a valid exercise of the rulemaking authority delegated to the Departments of Labor and the Treasury The plaintiff therefore erred in arguing that pension plans could not require that an employee work a full calendar year to get a year's credit for vesting purposes.

b. *The Text of the Benefit Plan*

Petitioner also argued that the Benefit Plan was not properly drafted to take advantage of the elapsed time regulations because it uses the term "year of service" rather than the term "period of service" to describe the length of time an employee must work to get a year's credit for vesting purposes. This issue is hardly of public importance, inasmuch as it involves the drafting of the vesting provisions of one benefit plan. And the district court properly characterized petitioner's argument as "nonsense, both linguistically and legally." (*Doe I*, Petition at 21a). The elapsed time regulations use the term "year of service" interchangeably with "period of service," (*see, e.g.*, 26 C.F.R. § 1.410(a)-7(d)(1)(i)), presumably because a year of service *is* a period of service.

c. *The Benefit Plan's Use of Elapsed Time*

Finally, petitioner's argument that in fact the Benefit Plan did use the 1,000 hour rule is a total fabrication, as the district court found. *Doe I*, Petition at 21a. As petitioner knew from many years of rendering legal advice to his clients on Benefit Plan matters, the Plan has always used elapsed time. The way in which it filled out the Form EBS-1, on which petitioner places so much weight, is, as the district court found, of no relevance whatever to petitioner's individual claims. The form sought information, in the early stages of administration of the statute, about various aspects of benefit plan administration. It was not

known at the time whether there would be any elapsed time regulations, and the form called only for a number of hours required for a year of service credit; A Corporation, which uses a 1,000 hour rule for seasonal employees, therefore filled in "1,000" as the number of hours. How petitioner thinks this helps him is not clear, but it does not. As he knew from the text of the plan, the Benefit Plan uses and has always used elapsed time to compute vesting service.

B. The Insurance Plan Action *(Doe II)* Does Not Raise Any Legal Question at All.

As with the Savings Plan Action, the Insurance Plan Action was dismissed on grounds in addition to the meritless nature of petitioner's legal claims. But the only question petitioner presents to this Court is whether his claims are sound. They are not.

Petitioner claimed that A Corporation owed a refund of dividends that it had received from the insurance carrier. As the public reports filed by A Corporation make clear, the dividends were received on account of a group of insurance plans that included not only the plan to which petitioner and other A Corporation employees contributed but also plans for which A Corporation paid the full amount of the premium. It was therefore not possible to say that the refunds were attributable to contributions by petitioner or other plan participants (and in fact they were not). More significantly, the legal basis on which petitioner proceeded was simply inapplicable. He cited regulations that confer on certain small plans an exemption from disclosure requirements if those plans choose to return certain dividends to plan participants. *See* 29 C.F.R. §§ 2520.104-20, 104-20(a), 104-20(b)(3)(iii) and 104-21(a). The Benefit Plan is too big to fit within the regulations, and has never sought such an exemption. Petitioner pointed to no other source of the alleged obligation to pay over the dividends, and none exists.

IV.

Conclusion

These cases should never have been brought. They were from their inception egregious examples of a lawyer trying to browbeat his former clients into paying him off based on imaginary claims in areas of the law in which petitioner had done legal work for them and had given them legal advice that, like a sworn statement he had made to another court, was inconsistent with his claims in these actions. The petition should be denied.

Respectfully submitted,

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October 14, 1986

Appendix

26 C.F.R. § 1.410(a)-7(a)(1)(ii) provides:

> (ii) Under the alternative method set forth in this section, by contrast, an employee's statutory entitlement with respect to eligibility to participate, vesting and benefit accrual is not based upon the actual completion of a specified number of hours of service during a 12-consecutive-month period. Instead, such entitlement is determined generally with reference to the total period of time which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer or employers maintaining the plan. The alternative method set forth in this section is designed to enable a plan to lessen the administrative burdens associated with the maintenance of records of an employee's hours of service by permitting each employee to be credited with his or her total period of service with the employer or employers maintaining the plan, irrespective of the actual hours of service completed in any 12-consecutive-month period.

26 C.F.R. § 1.410(a)-7(d)(1)(i)-(ii) provides:

> (d) *Vesting*-(1) *General rule.* (i) For purposes of section 411(a)(2), relating to vesting in accrued benefits derived from employer contributions, a plan which determines service to be taken in account on the basis of elapsed time shall provide that an employee is credited with a number of years of service equal to at least the number of whole years of the employee's period of service, whether or not such periods of service were completed consecutively.

Appendix

(ii) In order to determine the number of whole years of an employee's period of service, a plan shall provide that non-successive periods of service must be aggregated and that less than whole year periods of service (whether or not consecutive) must be aggregated on the basis that 12 months of service (30 days are deemed to be a month in the case of the aggregation of fractional months) or 365 days of service equal a whole year of service.